

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

Case No. 06-01888-hb

Adversary No. 09-80085-hb

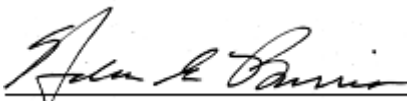
**ORDER ON MOTION TO DISMISS AND
MOTION FOR SANCTIONS**

The relief set forth on the following pages, for a total of 6 pages, including this page, is hereby **ORDERED**.

**FILED BY THE COURT
08/05/2009**



Entered: 08/05/2009


US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Lee Holt Judd,

Debtor.

Carol A. Simpson,

Plaintiff,

v.

Robert F. Anderson, Trustee,

Defendant.

Case No. 06-01888-hb

Adversary No. 09-80085-hb

**ORDER ON MOTION TO DISMISS AND
MOTION FOR SANCTIONS**

Chapter 7

This matter comes before the Court on the Motion of the Defendant, Robert F. Anderson, Trustee, to dismiss the Complaint of the Plaintiff pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is applicable to this Adversary Proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, and for sanctions pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure. The Plaintiff, although given proper notice of the hearing, did not appear at the hearing.¹ She filed a written objection to the Trustee's Motion to Dismiss, but did not file a written objection to the Trustee's Motion for Sanctions.

The Debtor, Lee Holt Judd, filed a Voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code on May 4, 2006. The matter was subsequently converted to Chapter 7. The Defendant, Robert F. Anderson, was appointed to act as Trustee. Plaintiff's complaint requests a judgment for conversion against the Trustee, alleging that "Defendant converted . . . \$20,384.69

for the estate's use.” However, also in the Complaint and prior to this allegation Plaintiff alleges several times that the funds in question, rental income from real property, were sent by the party collecting the money to the Debtor, not the Trustee.

In order to state a claim for conversion, the Complaint must allege that the Trustee took or assumed ownership of the funds. *Castell v. Stephenson Finance Company*, 244 S.C. 45, 135 S.E.2d 311, 313 (S.C. 1964) provides as follows:

Conversion is a tortuous act, and may arise either by wrongful taking of chattel or by some other illegal assumption of ownership, by illegally using or misusing it, or by wrongful detention.

See also *City of Charleston SC v. Hotels.com LP*, 520 F.Supp.2d 757 (D.S.C. 2007); *Williams-Garrett v. Murphy*, 106 F.Supp.2d 834 (D.S.C. 2000). Similar statements regarding the elements of conversion have been stated by this Court. *In re Ducane Gas Grills*, 320 B.R. 324 (Bankr. D.S.C. 2004); *In re Shaffer*, 305 BR 771 (Bankr. D.S.C. 2004); and *In re Derivium Capital, LLC*, 380 B.R. 429 (Bankr. D.S.C. 2006). The specific factual allegations of the Complaint allege that the Debtor received the funds. Since the Complaint does not allege the Trustee took or assumed ownership of the funds, it does not state a claim for conversion against the Trustee.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a case may be dismissed for “failure to state a claim upon which relief can be granted.” The Fourth Circuit Court of Appeals and this Court have described the standard as follows:

[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.

¹ After the hearing Plaintiff faxed a note to Chambers, docket no. 14, explaining that she experienced an illness at the time of the hearing. However, the note did not request any relief from the Court.

Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999); *see also Prospect Capital Corporation v. Cole (In re Cole)*; C/A No. 07-04074-hb, A/P No. 07-80165-hb (Bankr. D.S.C. Oct. 20, 2008); *Killian v. Greentree Servicing, LLC (In re Killian)*, C/A No. 05-14629-hb, A/P No. 08-80250-hb (Bankr. D.S.C. July 23, 2009). The relief requested in the Complaint is not supported by the allegations therein and must be dismissed pursuant to Rule 12(b)(6). If Simpson has a claim against the Debtor, she may pursue a Proof of Claim with this estate. If the claim is allowed, she will be paid pursuant to the provisions of the Bankruptcy Code from any funds recovered.

The Trustee alleges in his Motion for Sanctions that Simpson's Complaint is designed to harass and intimidate the Trustee. In support of his Motion the Trustee proffered evidence that Plaintiff, Simpson, testified at her Rule 2004 Examination that she was close friends with the Debtor for several years. Beginning in 2003, Simpson, an attorney, did substantial legal work for the Debtor. On June 16, 2005, approximately ten and a half months before she filed bankruptcy, the Debtor transferred two townhouses near Key Largo, Florida to Simpson. As a result of the transfers, Simpson has filed two claims against the bankruptcy estate in the amount of \$1,125,000.00 each. Attached to the claims are explanations indicating that the Debtor, despite the transfer of the units, had promised to make all payments on the mortgages on the townhouses and repurchase them from Simpson. These are the same townhouses that produced income that is the subject of Simpson's Complaint in this proceeding. The Trustee has not objected to the claims filed by Simpson; however, the time for filing objections by the Trustee has not expired.

These are not the only matters pending between the Trustee and Simpson. The Trustee brought an action against Simpson and her parents for the benefit of the estate to avoid the

transfer to them of \$231,000.00 post-petition, pursuant to 11 U.S.C. § 549. *See* A/P No. 08-80034-hb. The Trustee has also brought an action in the United States District Court for the District of South Carolina against Simpson for breach of fiduciary duty and self-dealing. *See* Case No.: 6:08CV3034-GRA.

The Trustee is requesting that Simpson be sanctioned for filing the Complaint and failing to withdraw it upon demand pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, which provides in part as follows:

(b) *Representations to the Court.* By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Rule 11 of the Federal Rules of Civil Procedure is almost identical to Rule 9011. The Court of Appeals for the Fourth Circuit has held that Courts may look to cases that interpret Rule 11 in cases involving Rule 9011. *McGahren v. First Citizens Bank and Trust Company (In re Weiss)*, 111 F.3d 1159, 1170 (4th Cir. 1997). Under Rule 11, "the inquiry focuses only on whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified. If the standard of objective reasonableness is unsatisfied, sanctions are mandatory." *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987).

A reasonable attorney could not have believed Simpson's actions in filing the Complaint for conversion against the Trustee, and failing to withdraw the same pursuant to the Trustee's demand and the procedures of Rule 9011, were factually and legally justified. Simpson had to

know on these facts that her claim, if any, was against the Debtor or the estate. The Complaint accusing the Trustee of conversion was not warranted by the facts or the law and therefore could only be intended to harass and intimidate the Trustee. Sanctions should be imposed under Rule 9011.

The nature of sanctions imposed is dictated by Rule 9011(c)(2):

A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. . . . if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

The Trustee has submitted a Statement of Attorney's Fees pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure. In order to deter subsequent conduct, Simpson shall pay to the Trustee's reasonable attorney's fees and costs in the amount of \$6,930.30.

It is therefore ORDERED, ADJUDGED, and DECREED that the Complaint of the Plaintiff is dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Plaintiff must pay the Trustee's attorney's fees and costs in the amount of \$6,930.30 incurred as a result of this action pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure.

AND IT IS SO ORDERED.